

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 265 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

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ALTAFKHAN ASHRAFKHAN BALUCHI

Versus

KESHARCHAND DALICHAND SHROFF

Appearance:

1. Special Criminal Application No. 265 of 2002
MR JF SHAH for Petitioner No. 1
..... for Respondent No. 1
MR VM PANCHOLI, LD.ADDL.PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/04/2002

ORAL JUDGEMENT

#. This is a petition under Article 226 of the Constitution of India for quashing and setting aside the

complaint being Criminal Case No.19874/1997 filed before the learned Chief Judicial Magistrate at Bharuch by respondent No.1 for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

#. The said respondent filed the Criminal Complaint before the said Court stating that the petitioner herein had collected loan and by discounting the amount of cheque, the cheque in question was issued by him on 10.4.1997 in the sum of Rs. 3.00 lacs in favour of the contesting respondent. That the cheque was presented to the bank, however, it was dishonoured and, therefore, it was returned to the contesting respondent on 25.5.1997. Thereafter, the first respondent issued to and served upon the petitioner notice dated 2.6.1997 by Registered A.D.Post. The present petitioner refused to accept the said notice on 4.6.1997 and, therefore, it was returned to the contesting respondent with the aforesaid endorsement by the Postal Department. Thereafter, the contesting respondent waited for the expiry of period of notice and filed the aforesaid Criminal Complaint on 28.6.1997. The learned Magistrate recorded verification of the contesting respondent on oath and took cognizance of offence and issued process of summons.

#. After appearing before the trial Court, the present petitioner submitted an application before the trial Court, which is at page-7 at Annexure-A, stating that the petitioner was not served with notice in accordance with the provision made in Section 141 of the said Act and, therefore, he should be discharged from the said offence. The learned Magistrate heard the parties and dismissed the said application of the petitioner by order dated 16.7.1999.

#. Feeling aggrieved by the said order of the learned Magistrate the petitioner herein preferred Criminal Revision Application No.83/1999 before the Additional Session Judge, Bharuch. The learned Additional Sessions Judge, Bharuch, heard the said Criminal Revision Application and dismissed the same by order dated 15.12.2001 stating that there was already an endorsement of refusal on the envelop and ultimately it would become a question of fact, which can be decided on appreciation of evidence.

#. The petitioner herein has preferred this petition under Article 227 of the Constitution of India stating that the cheque was not issued on any existing date but it was after discounting the amount in question and, therefore, the complaint under Section 138 of the said

Act would not be maintainable.

#. I have heard the learned advocate for the petitioner and learned APP Mr.V.M.Pancholi, for the State of Gujarat.

#. It is very clear that the complaint placed at page-24 very clearly shows that on the date on which the petitioner had issued cheques in favour of respondent No.1, petitioner had collected an amount of Rs.3 lacs and had issued cheque for the said amount. This clearly shows that both the things took place simultaneously and, therefore, it has to be accepted that the cheque was issued by the petitioner for meeting with the existing debt. The only contention raised by the learned advocate for the petitioner is that no existing debt was there at the time when the cheque was issued, since the contesting respondent has stated in para-2 of the complaint that after getting the amount discounted, amount was collected by the petitioner. (Aa kaamna Aaropiyo amari fariyadi pedhi par rubru aavi nicheni vigat and varnanno cheque discount karavi te chequena nana lai gayel chhe.)

#. On a closed reading of said averment of para-2 of the complaint, it is clear that both the things took place simultaneously and loan was taken by the petitioner from respondent No.1 and at the same time, a cheque was issued for the said existing dues. In that view of the matter, it cannot be said that there was no existing due or debt at the time when the cheque was issued though this point does not appear to have been taken up before the two Courts below. This is a matter under Articles 226 and 227 of the Constitution of India and, therefore, the petitioner had argued the point and it was taken into consideration. The point raised before the trial Court and before the Sessions Court was not agitated here.

#. In above view of the matter when the cheque was issued against the existing debt, the complaint is maintainable and there is no reason to interfere with the said Criminal Case by exercising extra-ordinary jurisdiction under Article 227 of the Constitution of India.

##. For the foregoing reasons, this application deserves to be dismissed. It is accordingly dismissed at the admission stage.

(D. P. BUCH, J.)

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